Filed 10/27/16 Weakly-Hoyt v. Foster CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KATHI WEAKLY-HOYT,

Plaintiff and Appellant,

v.

LAWRENCE HUNT FOSTER et al.,

Defendants and Respondents.

F072293

(Super. Ct. No. 2011009)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. William A. Mayhew, Judge.

Arata, Swingle, Sodhi & Van & Vgmond, George S. Arata and Amanda J. Heitlinger for Plaintiff and Appellant.

Winget Spadafora & Schwartzberg and Richard P. Tricker for Defendant and Respondent Z Insurance Brokerage, Inc.

-ooOoo-

Appellant, Kathi Weakly-Hoyt, filed a complaint against respondent, Z Insurance Brokerage, Inc. (Z Insurance), Lawrence Hunt Foster, M.D., and Fairway Physicians Insurance Company (Fairway). At issue in this appeal is appellant's cause of action

against Z Insurance for negligence. According to appellant, Z Insurance, Foster's insurance broker, had a duty to submit her claim for medical malpractice against Foster to Foster's insurance carrier, Fairway.

The trial court ruled that Z Insurance had no duty to appellant and therefore sustained Fairway's demurrer to appellant's complaint without leave to amend. Thereafter, the trial court granted Z Insurance's motion for judgment on the pleadings. Appellant challenges these rulings arguing that, because she requested Z Insurance to submit her claim to Fairway, Z Insurance is liable for damages for failing to timely submit her claim.

The trial court correctly found that Z Insurance had no duty to appellant. Accordingly, the judgment will be affirmed.

BACKGROUND

The standard of review of a judgment on the pleadings is identical to that on a judgment following the sustaining of a demurrer. (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 876.) Accordingly, we derive the facts from the complaint. We must give the complaint a reasonable interpretation and assume the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 (*Aubry*).) However, contentions, deductions or conclusions of law will not be accepted as true. (*Id*. at p. 967.) We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

In June 2010 Foster negligently performed breast augmentation surgery on appellant. In October 2010 appellant gave notice to Foster that he had negligently performed the surgery and in June 2011 served Foster with a notice of intent to file action.

In August 2011 Foster filed bankruptcy. Appellant filed her complaint for medical malpractice against Foster in September 2011 and shortly thereafter filed her proof of claim with the bankruptcy court.

Within a few weeks of filing her medical malpractice complaint, appellant's counsel contacted Z Insurance by telephone. Z Insurance confirmed that it was Foster's insurance broker and that Foster had professional liability insurance for the relevant time period. However, Z Insurance refused to provide any specific information.

On December 2, 2011, appellant filed for relief from the automatic bankruptcy stay. Her application included a copy of the face page of an insurance policy issued on behalf of Foster by Fairway. Accordingly, the trial court took judicial notice of the fact that, as of December 2, 2011, appellant knew who Foster's insurer was. Further, appellant knew that the policy was in effect from September 1, 2011 to September 1, 2012, and was a "'claims made and reported' policy and not an 'occurrence' policy."

In January 2012, the bankruptcy court issued an order granting appellant relief to pursue her medical malpractice claim against Foster as to insurance proceeds only.

Thereafter, appellant's counsel contacted Z Insurance by mail to advise it of the bankruptcy court order. Counsel also forwarded the summons, complaint and order for relief and requested Z Insurance to forward this information to Foster's insurance company. Appellant's counsel re-sent these documents several times to Z Insurance. However, Z Insurance did not respond.

On October 24, 2012, appellant's counsel contacted Fairway and advised Fairway of appellant's medical malpractice claim. On November 2, 2012, appellant's counsel forwarded the summons, complaint, bankruptcy court's order and entry of default to Fairway. Fairway responded and advised counsel that there was no coverage for appellant's medical malpractice claim.

Thereafter, appellant's counsel sent letters to Z insurance and Fairway demanding payment of the approximately $294,000 judgment that was entered in favor of appellant on Foster's default. Fairway denied coverage because the claim was not made and reported during the policy period. Z Insurance denied being responsible for submitting appellant's claim to Fairway.

Appellant filed the underlying complaint against Z Insurance alleging intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, conspiracy, aiding and abetting tort, and negligence.

The trial court sustained Fairway's demurrer to appellant's complaint without leave to amend. The court found that appellant's December 2011 application for relief from the automatic bankruptcy stay conclusively established that appellant "knew about the policy of insurance issued to Dr. Foster by [Fairway] almost ten (10) months before the policy's coverage period expired." The court held that, "[g]iven this judicial admission, and the fact that each of [appellant's] causes of action against [Fairway] relies on the factual allegation that [appellant] did not know Fairway was Dr. Foster's insurer until after the policy period expired, the Court does not believe [appellant] can amend her Complaint to state facts sufficient to constitute any cause of action against [Fairway]."

Thereafter, on Z Insurance's motion, the trial court entered judgment on the pleadings in favor of Z Insurance. Again, the trial court observed that appellant knew who Foster's insurer was no later than December 2, 2011, but did not report her claim directly to Fairway until October 24, 2012, almost a year later and beyond the policy coverage period that ended September 1, 2012. The court noted that appellant "could have, and should have, given notice of her claim directly to Fairway" and concluded that Z Insurance did not owe appellant a duty to report anything.

DISCUSSION

Appellant has limited her appeal to her cause of action for negligence against Z Insurance. Appellant argues that the trial court erred in holding that Z Insurance did not owe her a duty to report her claim to Fairway because Z Insurance was Foster's broker, she gave Z Insurance notice of the claim, and she asked Z Insurance to forward the claim to Fairway. According to appellant, whether she had the ability to report her claim directly to Fairway is irrelevant.

"Insurance brokers owe a limited duty to their clients, which is only 'to use reasonable care, diligence, and judgment in *procuring* the insurance requested by an insured.'" (*Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal.App.4th 1278, 1283.) The insurance broker's client is the person or entity that contracts with the broker, communicates its insurance needs, reviews the quotes provided by the broker and decides what policy to purchase. (*Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 580 (*Travelers*).)

Appellant's request that Z Insurance forward her claim to Fairway does not impose a duty on Z Insurance to do so. Z Insurance's duties ran only to Foster. (*Travelers, supra*, 215 Cal.App.4th at p. 580.) There is no evidence that Z Insurance agreed to forward appellant's claim to Fairway thus taking upon itself an obligation to do so. (*Ibid.*) Accordingly, Z Insurance did not owe appellant a duty to report her claim to Fairway. Therefore, appellant cannot state a cause of action against Z Insurance for negligence. Appellant cites no authority to the contrary and, in fact, cites no authority whatsoever to support her position.

Appellant further argues that the trial court erred in not granting leave to amend the complaint. Appellant relies on the general rule that, when the complaint is defective, great liberality should be exercised in permitting a plaintiff to amend. (*Aubry, supra,* 2 Cal.4th at p. 970.)

When a demurrer is sustained without leave to amend, the appellate court must decide whether there is a reasonable possibility that the defect can be cured by amendment. If so, the trial court abused its discretion. (*Blank, supra,* 39 Cal.3d at p. 318.) However, the burden is on the appellant to show the manner in which the complaint can be amended and how the amendment will cure the defect. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098.)

Here, appellant vaguely asserts that there may be additional facts that would give rise to a finding of duty. Yet, she neither elaborates on what those specific facts are nor explains how they would cure the defect. Thus, appellant has not met her burden on appeal.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
GOMES, J.

_____
SMITH, J.